

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARCUS R. ELLINGTON,) No. C 11-00287 JW (PR)
Plaintiff,) ORDER OF PARTIAL DISMISSAL
v.) AND OF SERVICE; DIRECTING
STATE OF CALIFORNIA, et al.,) DEFENDANTS TO FILE
Defendants.) DISPOSITIVE MOTION OR NOTICE
) REGARDING SUCH MOTION;
) INSTRUCTIONS TO CLERK

Plaintiff, a California inmate at the Salinas Valley State Prison in Soledad, filed a pro se civil rights complaint under 42 U.S.C. § 1983, challenging the conditions of his confinement. Plaintiff's motion for leave to proceed in forma pauperis will be granted in a separate order. The Court will now conduct its initial review of the complaint.¹

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¹ Plaintiff filed a previous action under Case No. 10-04052 JW (PR), which was dismissed for failure to exhaust administrative remedies. Plaintiff was directed to file his claims as a new action after he exhausted his administrative remedies. Plaintiff attempted to reopen the action by filing a second amended complaint (“SAC”), but the Court denied the motion to amend and directed the SAC be opened as a newly filed action. Accordingly, the clerk opened the SAC as the instant action.

DISCUSSION

A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that a person acting under the color of state law committed a violation of a right secured by the Constitution or laws of the United States. West v. Atkins, 487 U.S. 42, 48 (1988). Pro se pleadings must be liberally construed. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

B. Plaintiff's Claims

Plaintiff claims that he qualifies as “disabled” under state and federal disability statutes, and that his disability includes physical impairments which entitle him to the use of a wheelchair. Plaintiff claims that defendants Sepulveda, Dr. Bright and Nurse Fox violated his rights when they denied his disability status and took away his wheelchair. Plaintiff claims that defendants acted with deliberate indifference to his serious medical needs, in violation of the Eighth Amendment. Liberally construed, the claims against defendants Sepulveda, Bright and Fox are cognizable under § 1983.

Plaintiff has made no allegations against named defendants State of California, Governor J. Brown, Warden Hedgpeth, or Associate Warden G. Ponder in the complaint. Accordingly, these defendants are DISMISSED from this action.

CONCLUSION

For the foregoing reasons, the Court orders as follows:

1. The clerk of the Court shall issue summons and the United States

1 Marshal shall serve, without prepayment of fees, a copy of the complaint, (Docket No. 1),
2 all attachments thereto, and a copy of this order upon **defendants Chief Medical Officer**
3 **Sepulveda, Dr. Bright and Nurse Fox at Salinas Valley State Prison**, (P.O. Box 1020,
4 Soledad, CA 93960-1020).

5 Defendants State of California, J. Brown, Warden Hedgpeth, and Associate
6 Warden G. Ponder are DISMISSED from this action. The Clerk shall terminate these
7 defendants from this action.

8 2. No later than **sixty (60) days** from the date of this order, defendants shall
9 file a motion for summary judgment or other dispositive motion with respect to the claims
10 in the amended complaint found to be cognizable above.

11 a. If defendants elect to file a motion to dismiss on the grounds plaintiff
12 failed to exhaust his available administrative remedies as required by 42 U.S.C.
13 § 1997e(a), defendants shall do so in an unenumerated Rule 12(b) motion pursuant to
14 Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v.
15 Terhune, 540 U.S. 810 (2003).

16 b. Any motion for summary judgment shall be supported by adequate
17 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
18 Civil Procedure. **Defendants are advised that summary judgment cannot be granted,**
19 **nor qualified immunity found, if material facts are in dispute. If any defendant is of**
20 **the opinion that this case cannot be resolved by summary judgment, he shall so**
21 **inform the Court prior to the date the summary judgment motion is due.**

22 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court
23 and served on defendants no later than **thirty (30) days** from the date defendants' motion
24 is filed.

25 a. In the event the defendants file an unenumerated motion to dismiss
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1 under Rule 12(b), plaintiff is hereby cautioned as follows:²

2 The defendants have made a motion to dismiss pursuant to Rule
 3 12(b) of the Federal Rules of Civil Procedure, on the ground you
 4 have not exhausted your administrative remedies. The motion will,
 5 if granted, result in the dismissal of your case. When a party you are
 6 suing makes a motion to dismiss for failure to exhaust, and that
 7 motion is properly supported by declarations (or other sworn
 8 testimony) and/or documents, you may not simply rely on what your
 9 complaint says. Instead, you must set out specific facts in
 10 declarations, depositions, answers to interrogatories, or documents,
 11 that contradict the facts shown in the defendant's declarations and
 12 documents and show that you have in fact exhausted your claims. If
 13 you do not submit your own evidence in opposition, the motion to
 14 dismiss, if appropriate, may be granted and the case dismissed.

15 b. In the event defendants file a motion for summary judgment,

16 the Ninth Circuit has held that the following notice should be given to plaintiffs:

17 The defendants have made a motion for summary judgment by which
 18 they seek to have your case dismissed. A motion for summary
 19 judgment under Rule 56 of the Federal Rules of Civil Procedure will,
 20 if granted, end your case.

21 Rule 56 tells you what you must do in order to oppose a motion for
 22 summary judgment. Generally, summary judgment must be granted
 23 when there is no genuine issue of material fact--that is, if there is no
 24 real dispute about any fact that would affect the result of your case,
 25 the party who asked for summary judgment is entitled to judgment as
 26 a matter of law, which will end your case. When a party you are
 27 suing makes a motion for summary judgment that is properly
 28 supported by declarations (or other sworn testimony), you cannot
 29 simply rely on what your complaint says. Instead, you must set out
 30 specific facts in declarations, depositions, answers to interrogatories,
 31 or authenticated documents, as provided in Rule 56(e), that
 32 contradict the facts shown in the defendants' declarations and
 33 documents and show that there is a genuine issue of material fact for
 34 trial. If you do not submit your own evidence in opposition,
 35 summary judgment, if appropriate, may be entered against you. If
 36 summary judgment is granted in favor of defendants, your case will
 37 be dismissed and there will be no trial.

38 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to
 39 read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477
 40 U.S. 317 (1986) (holding party opposing summary judgment must come forward with

41 ² The following notice is adapted from the summary judgment notice to be given to pro
 42 se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc).
 43 See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 evidence showing triable issues of material fact on every essential element of his claim).
2 Plaintiff is cautioned that failure to file an opposition to defendants' motion for summary
3 judgment may be deemed to be a consent by plaintiff to the granting of the motion, and
4 granting of judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52,
5 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

6 4. Defendants shall file a reply brief no later than **fifteen (15) days** after
7 plaintiff's opposition is filed.

8 5. The motion shall be deemed submitted as of the date the reply brief is due.
9 No hearing will be held on the motion unless the Court so orders at a later date.

10 6. All communications by the plaintiff with the Court must be served on
11 defendants, or defendants' counsel once counsel has been designated, by mailing a true
12 copy of the document to defendants or defendants' counsel.

13 7. Discovery may be taken in accordance with the Federal Rules of Civil
14 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or
15 Local Rule 16-1 is required before the parties may conduct discovery.

16 8. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the
17 court informed of any change of address and must comply with the court's orders in a
18 timely fashion. Failure to do so may result in the dismissal of this action for failure to
19 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

20 9. Extensions of time must be filed no later than the deadline sought to be
21 extended and must be accompanied by a showing of good cause.

22 DATED: April 21, 2011

23 
24 JAMES WARE
United States District Chief Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

MARCUS R. ELLINGTON,

Case Number: CV11-00287 JW

Plaintiff,

CERTIFICATE OF SERVICE

v.

STATE OF CALIFORNIA, et al.,

Defendants.

/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 4/22/2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Marcus R. Ellington E-44837
CSP-Salinas Valley State Prison
P.O. Box 1050
Soledad, CA 93960

Dated: 4/22/2011

Richard W. Wieking, Clerk
/s/ By: Elizabeth Garcia, Deputy Clerk